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No. 751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

INDIANA UNEMPLOYMENT COMPENSATION BOARD,

Petitioner,

v.

BENNER CORYELL LUMBER COMPANY, INC.

Respondent.

Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT

The State of Florida, by its counsel, submits this brief, as amicus curiae, in support of the petition for writ of certiorari to the Supreme Court of Indiana for the reason that it has a material interest in the outcome of this litigation since it involves the validity of provisions of the Indiana Unemployment Compensation Law which are analogous to provisions of the Florida Unemployment Compensation Law. If the questioned provisions of the Indiana Law are stricken as violative of the Federal Constitution, then the effective administration of the similar provisions of the Florida Law will be materially impaired.

OPINIONS BELOW

The decree of the trial court is set forth in the Record (p. 9). The opinion of the Supreme Court of Indiana (R. 12) is not yet reported in the official State reports but is reported in 29 N. E. (2d) 776.

The constitutionality of the quoted provisions of the Florida Unemployment Compensation Law has not been passed upon by the Supreme Court of Florida; however, that court has construed the same and interpreted the meaning thereof in the case of *Florida Industrial Commission, et al vs. Gary-Lockhart Drug Company, Inc. et al,* which opinion is reported in 143 Fla. 293.

STATEMENT OF GROUND OF JURISDICTION

The grounds in which this court has jurisdiction have been stated by the petitioner in their Petition For Writ Of Certiorari herein and we do not deem it necessary to further enlarge on this statement.

STATUTES INVOLVED

Employing Units, whether they be any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which control the employment of eight or more persons, are subject to the Unemployment Compensation Law of Indiana and the Florida Law is identical with the Indiana Law in this respect.

The basic definition of the term employer as that term is used in the Indiana Unemployment Compensa-

tion Law, Acts 1936 (Spec. Sess.), Chapter 4, page 80; as amended by Acts 1937, Chapter 125, page 705; as amended by Acts 1938 (Spec, Sess.), Chapter 6, page 24; as amended by Acts 1939, Chapter 121, page 585 [Burns' Ann. Stat. (1940), 52-1501, et seq.], includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);" (Sec. 2 (g) (1) of the Law) [Burns' Ann. Stat. (1940), 52-1502 (g) (1)].

Section 2 (g) (4) of the Indiana Unemployment Compensation Law [Burns' Ann. Stat. (1940), 52-1502 (g) (4)], includes within the term employer:

> "Any employing unit which together with one or more other employing units, is owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;"

The basic definition of the term employer as that term is used in the Florida Unemployment Compensation Law, Acts 1937, Chapter 18402; as amended by Acts of 1939, Chapter 19637, includes:

> "Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment eight or more individuals (irrespective of whether the same individuals

> are or were employed in each such day)" [Par. I, Sec. 3, Subd. G, Chapter 19637, Acts of 1939, Laws of Florida (Florida Unemployment Compensation Law)].

Par. IV, Sec. 3, Subd. G, Ch. 19637, Acts of 1939, Laws of Florida (the Florida Unemployment Compensation Law) includes within the term employer:

> "Any employing unit which, together with one or more employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests or by husband and wife, or which owns or controls one or more other employing units or a majority of the voting stock of one or more corporations (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units, or interests, or both, would be an employer under Paragraph 1 of this subsection."

ARGUMENT

It is not our desire to unnecessarily burden the court with a repetition of the argument advanced by petitioner as reasons for granting the Writ of Certiorari herein, but we would like to address our argument briefly to that phase of the case primarily concerned with common control of employing units as classified under the Unemployment Compensation Laws.

COMMON CONTROL PROVISION ESSENTIAL AND PERMISSIBLE TO PREVENT EVASION.

Laws applicable to employers of eight or more can very easily be evaded by the simple procedure of splitting establishments. Particularly is this true in certain types of businesses where labor costs represent a substantial part of the total expense of operation and

where efficiency would not be materially impaired by a division into several and smaller units. In such instances an employer would find it profitable to split his establishments into several small units, each employing not more than six or seven employees.

An Unemployment Compensation Law materially affecting the welfare of many individuals cannot be successfully administered under circumstances permitting such obvious evasions.

It appears, therefore, that the clear purpose of the quoted provisions of the Florida Law, and other State laws containing similar provisions concerning the liability of employing units under common control, was to safeguard the interest of the Government against possible loss of revenue for unemployment compensation purposes which would result from the simple procedure of splitting establishments into smaller units, each employing less than the number of employees required to bring them within the terms of the Act.

Where unity of control between corporations actually exists, the legislative body undoubtedly has power to enact legislation so as to prevent manipulating in order to avoid taxation.

United States vs. Whyel 19 F. (2d) 260-262 (1927).

The opinion in the Indiana case, a review of which is sought by the petitioner herein, is based almost entirely upon the reasoning in the case of *Independent Gasoline Company vs. Bureau of Unemployment Compensation* (Ga.) (1940) 10 S. E. (2d) 58. In the Georgia case, supra, the court said:

> "The defendant is a corporation and as such is an artificial person . . . this legal entity re-

> tains its separate and independent character regardless of the ownership of its capital stock and as such it cannot be held liable for the obligation of a stockholder, nor are the stockholders liable for the obligations of the corporation."

However, in a later case, *Maine U. Comp. Com'n. vs. Androscoggin Junior, Inc.*, 16 A (2d) 252, the Supreme Court of Maine in upholding the validity of a similar provision in the Maine Unemployment Compensation Law said:

> "While it is true that a corporation is a separate entity from its stockholders, yet it is apparent that the legislature, when it enacted this statute, intended to go behind the corporate veil and discover actuality and if it were found that the company, although a corporation, were one so controlled, compel contribution. Otherwise, an individual intending to carry on a business of considerable magnitude, requiring the employment of many more than eight, could organize several corporations, each employing less than eight, escape contribution, and deprive many employees of the benefits intended by the Act.
>
> "In *Coffin et al. v. Rich*, 45 Me. 507, 71 Am. Dec. 559, a statute was held constitutional that provided that stockholders should be personally liable for debts contracted by the corporation following the enactment of the statute. Also see *Eames v. Savage*, 77 Me. 212, 219, 52 Am. Rep. 751; 34 *Harvard Law Review*, 584; 27 *Harvard Law Review* 386; 42 *Harvard Law Review*, 955; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 31 S. Ct. 387, 55 L. Ed. 458; *Chicago, Milwaukee & St. P. Railroad Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490 on page 501, 38 S. Ct. 553 on page 557, 62 L. Ed. 1229. In the latter case, the Court said:
>
> "In such a case the courts will not permit themeslves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal

> with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

Also in the Georgia case, supra, the court said:

> "It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184. But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholder who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro rata share of the tax borne by the minority stockholder enabled the majority stockholder to escape his obligations."

And yet the avoidance of evasion has generally been upheld as a basis for classification. See *Tyler v. United States,* (1930) 281 U. S. 497, 505; *Helvering v. Bullard,* (1938) 303 U. S. 297, 302; *Helvering v. City Bank Farmers Trust Co.,* (1935), 296 U. S. 85, 92; *Ruppert v. Caffey,* (1920), 251 U. S. 264, 282.

The mere fact that some innocent parties come within the purview of such provision is not material if the classification is otherwise reasonable. The harmless is often times brought within the regulation or prohibition in order to abate or destroy the harmful. *Euclid v. Ambler Company* (1926) 272 U. S. 365.

It is a general rule that a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of course, the rule, however, is subject to the qualification that the separate

identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the protection or enforcement of public or private rights. *New Colonial Ice Company v. Helvering*, 292, U. S. 435 (442).

CONCLUSION

The decision of the Indiana Court in the instant case, if allowed to stand, will have the effect of denying the protection and benefits of the Unemployment Compensation Law to a great number of workers, not only in the State of Indiana but the State of Florida and other States having similar provisions in their laws. It will create an unfair competitive situation as between large scale business organizations where one operates as an integrated business and the other finds it feasible to effect division of its functions, thereby resulting in severe economic discrimination. It will permit an obvious device for wholesale evasion of the Unemployment Compensation Law and will raise serious questions affecting the future rights of the States and their legislatures to classify subjects of taxation in accordance with the needs of legislation at issue. And finally, it will give impetus to a volume of litigation involving employers who have previously paid contributions under the common control provisions and by others involving the charging of benefit payments, which have been made to employees brought under the law by virtue of the common control provisions, to the accounts of their employers.

Since the opinions in the Georgia case and the Indiana case have been handed down, the implications of the Federal question contained in said decisions

have raised a very serious question of enforcement in the State of Florida. Many of the employers of this State who have been brought under the law by virtue of the common control provisions and have paid contributions thereunder are now questioning their liability. A number of claims for refunds have been filed and difficulty is being encountered in collecting contributions which are now due. The agency of this State which administers its Unemployment Compensation Law is faced with a strong possibility that a volume of litigation will follow in this State, raising questions of the constitutionality of the common control provisions under the Federal Constitution.

And so it is that the State of Florida, as amicus curiae, urgently prays that this Court will take jurisdiction of this cause in order that a final and authoritative decision may be given concerning the constitutionality of the questioned provisions of the Unemployment Compensation Law and thereby avoid the loss of material rights by citizens of this and other States under the unemployment compensation program and at the same time prevent a volume of unnecessary, costly and burdensome litigation thereon.

Respectfully submitted,

J. Tom Watson,
Attorney General.

Lewis W. Petteway,
Assistant Attorney General.

John P. Mack,
General Counsel,
Florida Industrial Commission.

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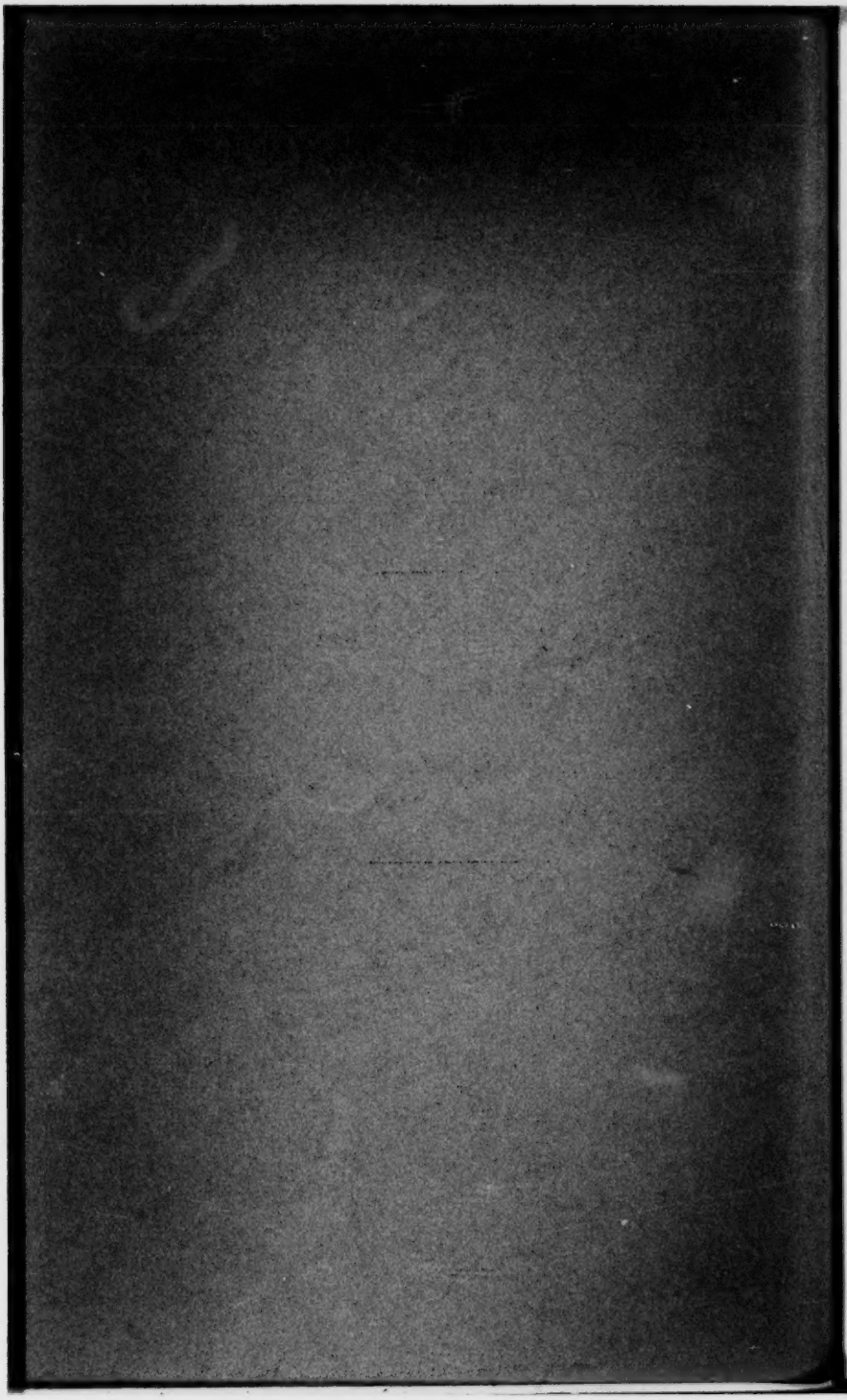
BENNER-CORYELL LUMBER COMPANY, INCORPORATED

BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF THE STATE OF MAINE ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT



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MAY IT PLEASE THE COURT:

The Unemployment Compensation Commission of the State of Maine appears on this application for a writ of certiorari as a friend of the court.

The Maine Unemployment Compensation Commission is interested in the final determination by the highest court of the United States of the subject matter in the above entitled

case since the principle involved is directly connected with the administration of the Unemployment Compensation Law of Maine.

Section 19 (f) (4) of chapter 192 of the public laws of Maine, 1935 as amended provides:

> "Employer means * * * (4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls 1 or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, or interests, or both, would be an employer under paragraph (1) of this subsection."

The foregoing section of the Maine statute is substantially the same as the section of the Indiana Unemployment Compensation Law involved in this action.

The Supreme Judicial Court of Maine has passed upon the validity, construction and application of this section of the Maine statute and has found the same constitutional and proper. In view of the decision by the highest court of Indiana in the above entitled action, it is not only possible but expected that the Indiana case will be cited and used to cast doubt upon the application of the decisions heretofore rendered by the Supreme Judicial Court of Maine. The Maine decisions pertaining to this section of the statute are as follows: No. 605 Maine Unemployment Compensation Commission vs. Androscoggin, Junior, Inc.; No. 606 Maine Unemployment Compensation Commission vs. Edward M. Healy; No. 1010 Maine Unemployment Compensation Commission vs. E. J. Conquest. 16 (A) 2nd 252.

The fundamental basis upon which employer liability is imposed by the Maine statute is the employment of eight or more persons. So long as this establishes the primary basis for liability, it appears to be necessary to provide by statute for liability in apparent exceptional cases in order to prevent evasion of liability. The common control section of the statute prevents an employer of eight or more from so organizing his business in units or divisions as to have less than eight in the respective units and thereby evading liability to pay unemployment contributions. The statutory classification by which liability is imposed upon employers of eight or more is in part justified as a reasonable classification because of the statutory provision which operates to prevent evasion of the statutory classification. In the absence of a liability imposed by virtue of a common control section, the possibility of evading employer liability would be so open as to deny to a substantial number of workers the right to unemployment benefits. The Unemployment Compensation program, however, was conceived to give to workers a degree of security against the hazards of unemployment.

There are 4037 employers currently liable to pay contributions to the Unemployment Compensation Commission based on wages payable to approximately 214,000 employees. We can not state how many of these employers became liable by virtue of the common control section of the statute nor can we state how many employees will be protected when unemployed by virtue of current employment with an employer whose liability arose by virtue of the common control section of the statute. It is safe to say, however, that the number is substantial particularly as a result of the decision by the Supreme Judicial Court of Maine sustaining the validity of the section.

The common control section of the statute tempers the sharpness of the statutory classification in terms of the employment of eight or more individuals so as to render such classification less arbitrary and to avoid discrimination. The result of the application of the common control section of the statute produces similar treatment of all businesses and enterprises in the same category. It avoids the unfair situation, both as to the competitive basis of the employers and the treatment of working men alike which would result if one employer found it feasible to so divide his functions as to employ less than eight in his respective functions and thereby avoid liability.

In view of the decision of the Supreme Judicial Court of Maine, cited above, and the decision of the Supreme Court of Indiana in this case and the recent decision of the Georgia Supreme Court in the case of Independent Gasoline Company vs. Bureau of Unemployment Compensation of Georgia 10, S. E. 2nd, 58 a serious enforcement problem has been raised in this State. Employers who operate separate establishments under a common control seek to avoid liability in the face of the Maine decision by the argument that the facts in the Georgia and Indiana cases are more analogous to their situation than are the facts in the decision of the Maine Supreme Court. The application of the Maine decision is being unnecessarily restricted and enforcement on an equitable basis is becoming confused.

The administration is consequently charged with the extremely difficult problem of attempting to clarify the application of the common control section of its State Law in the light of the decision in its own State and in the light of the Indiana and Georgia decisions.

The State of Maine, therefore, by and through its duly

appointed and qualified Attorney General, respectfully prays that this court may take jurisdiction of the above entitled matter so that an authoritative and final determination may be reached.

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Attorneys for State of Maine and Maine Unemployment Compensation Commission

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BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA AMICUS CURIAE

ABRAM P. STAPLES,
Attorney General of Virginia.

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Assistant Attorney General of Virginia.

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BRIEF OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA AMICUS CURIAE

The Unemployment Compensation Commission of Virginia, by the Attorney General of Virginia, pursuant to the rules of this Court, files this brief, as *amicus curiae*, in support of the petition of The Indiana Unemployment Compensation Board for a writ of *certiorari* in this case.

The Unemployment Compensation Commission of Virginia is interested in this case because the Virginia unemployment compensation law contains provisions[1] similar to Sections 2(g)(1) and 2(g)(4) of the Indiana statute involved in this suit. Since this Court declined to review the recent Georgia case of *Independent Gasoline Company* v. *Bureau of Unemployment Compensation of Georgia.* ..... Ga. ....., 10 S. E. (2d) 58, Cert. den. 61 S. Ct. 175, a number of employing units in Virginia, against which the payroll tax on wages had been assessed by the Virginia Commission under Section 2(i)(4) (quoted in the margin) have refused to con-

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[1]The Virginia statutory provisions referred to are as follows:

" 'Employer' means:

2 (i) (1): Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals, irrespective of whether the same individuals are or were employed in each such day.

2 (i) (4): Any employing unit which together with one or more other employing units, is owned or controlled, by legally enforcible means or otherwise, directly or indirectly by the same interests, or which owns or controls one or more other employing units, by legally enforcible means or otherwise, and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection." (Michie Virginia Code, 1940 Cumulative Supplement, Section 1887 (94) 2 (i) (1) and 2 (i) (4), Acts 1936, Extra Session, ch. 1, amended Acts 1938, ch. 446, amended Acts 1940, ch. 333.)

tinue the payment of such assessments on the ground that said section violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution. This stand of such employing units has been encouraged by the recent decision of the Supreme Court of Indiana here involved. As we interpret the Indiana Court's opinion, it, unlike the opinion in the Georgia case, rests solely on the conclusion that plaintiff's (respondent in this case) Federal constitutional rights would be violated by an enforcement of said provisions. A final adjudication of the question by this Court is obviously necessary to a proper administration, not only of the Virginia statute, but of similar statutes of more than thirty other States, as pointed out in the petition filed by the State of Indiana.

Respectfully submitted,

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